A

CHUNG TAIN KONG

v.

PP

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FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ALAUDDIN MOHD SHERIFF PCA
HASHIM YUSOFF FCJ
[CRIMINAL APPEAL NO: 05-34-2009(S)]

C

30 NOVEMBER 2009

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Appeal against conviction and sentence - Whether appellant acted in self defence - Whether stabbing to death of deceased justifiable - Whether appellant's*

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action covered by provisions of s. 100(a) or (b) of the Penal Code

The appellant was convicted and sentenced to death by the High Court for murdering his girlfriend ('the deceased'). The appeal to the Court of Appeal was dismissed. Hence his appeal to this

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court. Only one issue was raised in this appeal *ie*, that the appellant was acting in self-defence when he killed the deceased. It was the appellant's submission that it was the deceased who was the aggressor. It was also his contention that the learned trial judge did not consider the fact that it was the deceased who had

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inflicted the grievous wound to the appellant's neck. That being the case, he submitted therefore that it gave the appellant the right of self-defence even to the extent of causing death to his assailant.

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Held (dismissing the appeal; upholding conviction and sentence)

Per Hashim Yusoff FCJ delivering the judgment of the court:

(1) The trial judge had made a reasonable conclusion based on all the evidence that it was not a case of self-defence. The trial

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judge found that the stabbing to death of the deceased by the appellant was unreasonable and not justifiable and such act was in excess of private defence especially done to a physically inferior and weaker person (*Lee Thian Beng v. PP; PP v. Abdul Manap)*. (para 13)

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(2) The killing was not justifiable as it was the appellant who initiated the aggression by advancing towards the deceased even after she had warned him not to do so while having a knife in her hand. His aggression culminated in his multiple stabbings of the deceased even after there was no imminent danger to his own life because the deceased had already fallen to the floor and was quite helpless at that material time when the appellant took the knife from her and stabbed her. His action was therefore not covered by the provisions of s. 100(a) or (b) of the Penal Code. (para 15)

(3) The appellate court should not disturb the findings of facts by the trial judge unless they were against the weight of evidence. Having considered the evidence in its totality and the reasons given by the trial judge and the concurrent findings by the Court of Appeal, there was no reason to interfere with the decisions made. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabit dan dikenakan hukuman mati oleh Mahkamah Tinggi untuk kesalahan membunuh teman wanitanya ('simati'). Rayuan yang dibuat kepada Mahkamah Rayuan telah ditolak. Oleh itu, rayuan ini kepada mahkamah ini. Hanya satu isu yang timbul dalam rayuan ini iaitu bahawa perayu telah bertindak untuk mempertahankan diri apabila dia membunuh simati. Menurut perayu, simati adalah penyerang. Perayu juga menghujah bahawa hakim bicara tidak menimbang fakta bahawa simati telah menyebabkan kecederaan serius kepada leher perayu. Oleh itu, perayu menyatakan bahawa ia memberikan perayu hak pertahanan diri sehingga tahap menyebabkan kematian penyerangnya.

Diputuskan (menolak rayuan; mengekalkan sabitan dan hukuman)
Oleh Hashim Yusoff HMP menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah membuat kesimpulan yang munasabah berdasarkan keterangan bahawa ini bukanlah kes pertahanan diri. Hakim bicara mendapati bahawa penikaman sehingga mati oleh perayu terhadap simati tidak munasabah dan tidak berjustifikasi dan perbuatan tersebut melebihi hak pembelaan persendirian, terutama sekali apabila dilakukan ke atas insan yang inferior dan lebih lemah (*Lee Thian Beng v. PP; PP v. Abdul Manaf)*.

A **(2)** Pembunuhan itu tidak berjustifikasi kerana perayu yang telah mula menyerang apabila mendekati simati walaupun simati telah memberi amaran untuk tidak mendekatinya sambil memegang pisau di dalam tangannya. Serangan perayu memuncak apabila perayu telah menikam simati beberapa kali walaupun perayu
B tidak berada dalam keadaan bahaya sebab simati telah jatuh ke lantai dan tidak berdaya pada masa perayu mengambil pisau daripada simati dan menikam simati. Oleh itu, tindakan perayu tidak dirangkumi oleh peruntukan s. 100(a) atau (b) Kanun Keseksaan.

C **(3)** Mahkamah rayuan tidak sepatutnya mengganggu penemuan fakta oleh hakim bicara, kecuali ia bertentangan dengan arus keterangan kukuh. Setelah mempertimbangkan keterangan secara keseluruhan, dan alasan-alasan yang telah diberi oleh
D hakim bicara dan penemuan dapatan-dapatan bersama oleh Mahkamah Rayuan, tiada sebab untuk campurtangan dengan keputusan yang telah diputuskan.

Case(s) referred to:
Ahmad Shah Hashim v. PP [1979] 1 LNS 4 FC ***(refd)***
E *Lee Thian Beng v. PP [1971] 1 LNS 61 FC* ***(refd)***
PP v. Abdul Manap [1952] 1 LNS 80 HC ***(refd)***
PP v. Ngoi Ming Sean [1981] CLJ 93; [1981] CLJ (Rep) 251 HC ***(refd)***

Legislation referred to:
F Penal Code, s. 100(a), (b)

For the appellant - Dato' Chau Chin Tang (Yong Pei Yi with him); M/s Chau & Tien
For the respondent - Ahmad Bachee DPP

G *[Appeal from Court of Appeal; Criminal Appeal No: S-05-44-2003]*

Reported by Suhainah Wahiduddin

JUDGMENT

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Hashim Yusoff FCJ:

[1] The appellant was convicted and sentenced to death by the High Court at Kota Kinabalu, Sabah for murdering his girlfriend
I (the deceased). His appeal to the Court of Appeal was dismissed. Hence his appeal to this court.

[2] The facts of the case have been sufficiently narrated in the judgment of the Court of Appeal (see Appeal Record Volume I pp. 5 - 7, paras. 1016). A

[3] There was only one issue raised in the appeal before us ie, that the appellant was acting in self-defence when he killed the deceased. B

[4] Learned counsel for the appellant submitted that it was the deceased who was the aggressor. He based his argument on the injuries sustained by the appellant, particularly those on his neck and arm. This can be seen from the medical report of the appellant, (exh. D1) (see Appeal Record Volume 2(2) at 257, para. (2) I, II and III and para. (3) I and II). He submitted that since the deceased had caused grievous injuries on the appellant's neck, that would mean that she was the aggressor. C D

[5] It was also his contention that the learned trial judge did not consider the fact that it was the deceased who had inflicted the grievous wound to the appellant's neck. That being the case, he submitted therefore that it gave the appellant the right of self-defence even to the extent of causing death to his assailant. E

[6] On the same issue, learned counsel for the appellant submitted that although the learned trial judge had considered the pathologist's (PW2) evidence, he did not make any positive finding as to who was the aggressor. F

[7] With respect, we are unable to accept his argument. The learned trial judge in his grounds of judgment (at p. 270 - 271 Appeal Record Volume 2(2)) said, "PW2 told the court that injuries No. 12 to 19 (of the deceased) as a group, is usually seen in someone who is trying to defend oneself, especially injury No. 16 on the right thumb is normally seen in someone who is trying to grab hold of sharp object. These injuries according to PW2 are on the back of the forearm or hand indicating that the deceased tried to fend off attack and also trying to grab sharp object. Based on what is said by PW2 it is the court's view that contrary to what DW1 is suggesting, the deceased is trying to defend herself and using her forearm and hand to fend off attack. This court is more inclined to believe from the testimony of PW2 that the aggressor is not the deceased. If it is not the deceased then it can only be DW1." G H I

[8] Learned counsel further submitted that how the appellant sustained his injuries to his neck and his arm was never considered by the learned trial judge. However he said that the trial judge concluded from the evidence of PW4 (the brother in law of deceased) that the appellant was the one who stabbed himself in the neck.

[9] Again we disagree with the learned counsel. Based on the testimony of PW4 (see Appeal Record Volume 2(1) p. 53), he said that he rushed into the house upon hearing the deceased screaming out his name and after kicking the door of the bedroom open, he saw the deceased lying on the floor and also the appellant standing near the deceased holding something shiny. Then PW4 saw the appellant inflicting his own injuries by stabbing his own stomach and neck.

[10] Learned counsel for the appellant submitted that PW4's testimony regarding the injury to the appellant's neck was contradicted by the evidence of his sister (PW6) who had followed him into the same room. It was submitted that PW6 never said anything about the appellant injuring himself.

[11] We are of the view that even if PW6 never said anything about the appellant stabbing himself, it does not mean that PW4's testimony which said that he did, could not be believed. PW6 said that when she entered the room together with PW4, she saw the deceased lying on the floor and giving some kind of signal to them not to enter the room by waving her hand fast and pointing to the appellant. After that she said she got scared and ran out of the room. In fact, PW6 was recalled and became DW2. Then when asked by the defence counsel at that stage, DW2 (PW6) said she did not see the appellant injure himself. But she did see the appellant holding something shining towards his throat after which she left the room as she was scared, understandably. We can only come to the same conclusion arrived at by the learned trial judge regarding the evidence of PW4 and PW6 when his Lordship stated as follows "This court cautioned itself that both PW4 and PW6 are siblings to the deceased ... there is nothing to suggest that they are unreliable witnesses. PW4 would appear to this court as a reluctant witness and PW6, maintained her story throughout even when she was later recalled to the witness stand again." (See Appeal Record Volume 2(2) at 266).

[12] Essentially, it is a finding of fact by the trial judge. His Lordship made his findings based mainly on the testimonies of PW4 and PW6 and also that of the appellant and supported by the independent medical reports on both the deceased and the appellant. The learned trial judge came to the following conclusions based also on the evidence of the appellant. While the deceased was collecting her clothes from the bedroom, the appellant approached her and queried her as to why she was taking them. The deceased told him to mind his own business and to leave her alone. The appellant had tried to persuade the deceased to stay and if there was anything, they could always discuss. After that a quarrel broke out between them whereupon the deceased took a knife which was on top of the cupboard and warned the appellant not to get too near or she would stab him with the knife. Not believing that the deceased would make good her threat, the appellant continued to approach her upon which the deceased stabbed him. A struggle ensued with the appellant trying to snatch the knife from the deceased. He managed to twist her arm to her back and when the deceased fell onto the floor, the appellant used the same knife to inflict the 19 injuries on the deceased which led to her death. Thereafter the appellant used the same knife to inflict injuries to himself as he was so in love with the deceased that he would not want to live anymore without her. The appellant then placed the knife onto the deceased's hand in order to cover up his own act and put the blame on the deceased instead.

[13] At the risk of repetition we are of the view that the learned trial judge had made a reasonable conclusion based on all the evidence that it was not a case of self defence. The learned trial judge found that the stabbing to death of the deceased by the appellant was not justifiable and unreasonable and such act was in excess of private defence especially done to a physically inferior and weaker person, see *Lee Thian Beng v. PP* [1971] 1 LNS 61 FC and *PP v. Abdul Manap* [1952] 1 LNS 80 HC.

[14] In *PP v. Ngoi Ming Sean* [1981] CLJ 93; [1981] CLJ (Rep) 251 Ajaib Singh J (as he then was) explained the provisions of the right of private defence as follows:

> The Code provides that nothing is an offence which is done in the exercise of the right of private defence of a person's body. But there is no such right where the person has time to seek the protection of the public authorities. Nor will this right of private

> defence extend to the inflicting of more harm than is necessary for the purpose of defence. Subject to these limitations the right of private defence of the body extends even to the voluntary causing of death or any other harm to the assailant if the person who exercises his right of private defence is under a reasonable apprehension that death or grievous hurt would be caused to him by the assailant. The right of private defence commences as soon as there is reasonable apprehension of danger to the body and this right continues so long as such apprehension of danger continues (see ss 96 to 102 of the Code). And it goes without saying that the right of private defence ceases and is not available when there is no more apprehension of danger to the body.

We agree with the above to be the correct proposition of the law regarding the right of self defence.

[15] In the instant appeal, we agree with the learned trial judge that the killing was not justifiable as it was the appellant who initiated the aggression by advancing towards the deceased even after she had warned him not to do so while having a knife in her hand. His aggression culminated in his multiple stabbings of the deceased even after there was no imminent danger to his own life because the deceased had already fallen to the floor and was quite helpless at that material time when the appellant took the knife from her and stabbed her. His action was therefore not covered by the provisions of s. 100(a) or (b) of the Penal Code.

[16] In the course of his submission, learned counsel for the appellant however raised another issue about the trial court not having considered the exculpatory statement of the appellant. On this point we refer to the grounds of judgment of the Court of Appeal. Although the Court of Appeal found that the learned trial judge did not advert to the appellant's cautioned statement (exh. D2), it found that nothing was said in D2 that the appellant had acted in self-defence. The appellant could have easily said so in his cautioned statement. If he had, then it may be used to corroborate his testimony in court later. As such, the Court of Appeal held that since there was nothing in D2 for the trial judge to consider as corroboration of the appellant's testimony in court it was of the view that the evidence had been fully considered and appreciated by the learned trial judge. The Court of Appeal also found there was no misdirection by the learned trial judge

when his Lordship was of the view that the appellant had been less then truthful in his testimony. It is trite that a finding on the credibility of a witness by a trial judge should not be disturbed by an appellate court. (See *Ahmad Shah Hashim v. PP* [1979] 1 LNS 4 FC.

[17] Likewise it is also trite that the appellate court should not disturb the findings of facts by the trial judge unless they are against the weight of evidence. Having considered the evidence in its totality and the reasons given by the learned trial judge and the concurrent findings by the Court of Appeal, we find no reason to interfere with the decisions made.

[18] This appeal is therefore dismissed and the conviction and sentence upheld.

[19] My learned brothers Zaki Tun Azmi, CJ and Alauddin Dato' Mohd Sheriff, PCA have seen this judgment in draft and expressed their concurrence.